

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

PEAPOD INC.

Employer

and

Case No. 29-RC-9256

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 342-50, AFL-CIO  
Petitioner<sup>1</sup>

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Nancy Reibstein, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.<sup>2</sup>

2. The record indicates that Peapod Inc., herein called the Employer or Peapod, is a Delaware corporation with an office and place of business located at 697

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<sup>1</sup> The Petitioner's name (including its AFL-CIO affiliation) appears as corrected at the hearing.

<sup>2</sup> As explained in more detail below in Paragraph 4, I affirm the Hearing Officer's decision to reject the Employer's offer of proof regarding an "expanding unit" issue, and I deny the Employer's motion to dismiss the petition on that basis.

Hillside Avenue, New Hyde Park, New York, herein called the New Hyde Park facility, and is engaged in the retail sale and delivery of groceries ordered via the Internet. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of \$500,000, and purchased and received, at its New Hyde Park facility, goods and products valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Based on the foregoing and on the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. The Employer has moved to dismiss the petition herein as premature. Specifically, the Employer contends that its New Hyde Park facility will undergo a dramatic expansion by the end of 1999, and therefore that its current complement of bargaining-unit employees is not "substantial and representative" at this time. At the hearing, the Hearing Officer rejected the Employer's offer of proof on this issue, and referred the motion to dismiss to the undersigned.

The record indicates that the Employer's New Hyde Park facility opened in December 1998. During the payroll immediately preceding the filing of the instant petition on May 6, 1999,<sup>3</sup> the Employer employed approximately 30 personal shoppers and drivers, who pack and deliver the customers' grocery orders. According to its offer

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<sup>3</sup> All dates hereinafter are in 1999, unless otherwise indicated.

of proof, the Employer decided in mid-April to expand its operations, based on an expected greater volume of customer orders, and placed "help wanted" advertisements for additional shoppers and drivers at that time. The Employer claims that, if its witnesses were allowed to testify on this issue, their testimony would establish that the number of shoppers and drivers had already increased to 60 by the time of the hearing in mid-May; that it would further increase to 70 within a few weeks after the hearing; and that it would ultimately grow to 120 or 125 by the end of the year (December 1999). Furthermore, the Employer offered to prove that it expected to make the following changes in job classifications due to the expansion: that the current combined position of dispatcher/lead driver would be separated into one "supervisory" dispatcher position and 1 or 2 "supervisory" lead driver positions; and that the Employer would hire 2 or 3 hourly-paid, non-supervisory trainers whose job would be to train employees. The witnesses would testify that this one-year expansion plan was based on projections of increased volume, and based on a model used at Peapod's facility in Chicago, Illinois.

In considering whether a representation petition is premature due to an employer's anticipated expansion, the Board attempts to balance competing interests between current employees and future employees. As the Board stated in Toto Industries (Atlanta), Inc., 323 NLRB 645 (1997):

[C]urrent employees should not be deprived of the right to select or reject a bargaining representative simply because the Employer plans an expansion in the near future. The Board, however, does not desire to impose a bargaining representative on a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals.

Id. at 645. The Board therefore attempts to determine whether an employee complement is sufficiently "substantial and representative" to warrant an immediate election,

considering such factors as the size of the current workforce compared to the size of the ultimate expected workforce; the expected time lapse and rate of expansion until the full complement is reached; the certainty of the expansion; and the number of job classifications requiring different skills which are expected to be filled. Id.

In the instant case, I agree with the Hearing Officer that the Employer's offer of proof does not establish a basis on which to dismiss the petition. For, even if the Employer's proffered evidence were accepted, it does not establish that an immediate election would unreasonably disenfranchise a substantial number of future employees. Rather, the proffered evidence indicates that the current complement of employees is a "substantial and representative" one, based on the factors enunciated in Toto Industries, supra. Specifically, the evidence indicates that the Employer employed approximately 60 shoppers and drivers at the time of the hearing, and intended to employ approximately 70 drivers and shoppers within a few weeks of the mid-May hearing. Thus, by the time of the issuance of this Decision and Direction of Election in June 1999, the approximately 70 employees appearing on the Employer's payroll (and who would presumably be eligible to vote in a June or July election) would constitute at least half of the expected ultimate complement of 120 to 125. I find that number to be substantial. Furthermore, the vast majority of new employees would work in the same classifications as the current shoppers and drivers, using the same skills. The only new classification contemplated, that of trainers, is extremely small in number, and would involve training employees in the same shopping and driving skills. There is no evidence that the Employer's business is expected to change so radically in nature that the current classifications are not "representative" of the operations later this year.

Finally, although the Employer projects that its volume will grow enough to warrant the expansion, such growth is hardly certain. This is not a case, for example, where an employer wins a bid or contract for new work, and has definite, imminent plans to hire employees for the new work. Rather, the Employer's expansion is based on projections that are somewhat speculative in nature and remote in time. Under these circumstances, the employees' right to select or reject a bargaining representative should not be denied at this time simply because the Employer's volume might expand by the end of the year.<sup>4</sup>

In sum, based on the foregoing, I find that the present complement achieves the desired balance between insuring maximum employee participation in the selection of a bargaining agent, while not depriving current employees of immediate representation, if they so choose. I specifically find that the Employer's present complement of approximately 70 employees is sufficiently substantial and representative to warrant an immediate election.<sup>5</sup> Accordingly, I affirm the Hearing Officer's rejection of the offer of proof on this issue, deny the Employer's motion to dismiss the petition and find that a question affecting commerce exists concerning the representation of certain employees of the Employer.

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<sup>4</sup> The Board's consideration of the "certainty" of expansion in these cases, Toto Industries, supra, is analogous to its requirement of a "definite and imminent" closing in contracting-unit cases. Martin Marietta Aluminum, Inc., 214 NLRB 646 (1974).

<sup>5</sup> In Toto Industries, supra, wherein the Board adopted the regional director's decision that the conduct of an election at that time was warranted, the employee complement was 124 with an expected increase of 107. That ratio is nearly identical to that in this proceeding: 70 current employees with an anticipated hiring of an additional 50 to 55 employees. In Toto Industries, the employee complement at the time of the decision was approximately 55.6% of the expected complement. The Employer's current employee complement is 56% of the anticipated complement.

5. United Food and Commercial Workers, Local 342-50, AFL-CIO, herein called the Petitioner, seeks to represent the following unit of employees employed by

Peapod at its New Hyde Park facility:

All full-time and regular part-time drivers, personal shoppers and dispatchers, excluding supervisors and security guards as defined in the Act, office clericals, shift supervisors and subcontracted workers.<sup>6</sup>

There are two classifications in dispute. First, the Employer contends that the current dispatcher/lead driver is a supervisor as defined in Section 2(11) of the Act, and therefore must be excluded from the unit. Second, the Petitioner contends that a classification known as "shift supervisors" is supervisory and must be excluded from the unit.

In support of its positions on these unit issues, the Employer called zone manager Michael Pappas to testify. The Petitioner called personal shopper Lee LaCorte to testify. The Hearing Officer called dispatcher Joseph Parisi as a witness. No shift supervisors were called to testify.

The Petitioner has indicated its desire to proceed to an election in any unit found appropriate herein.

### **Overview of the Employer's operations**

The Employer's New Hyde Park facility is a wareroom/distribution center, located on the second floor above a supermarket called Edwards Super Store (herein called Edwards).<sup>7</sup> The second-floor wareroom contains aisles for dry goods, freezer and refrigerator areas, plus two offices. The Employer predominantly uses one office, which

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<sup>6</sup> The petitioned-for unit appears as amended at the hearing. The exclusion of "subcontracted workers" apparently refers to drivers from an (unspecified) on-call service, which Peapod uses as needed. According to zone manager Michael Pappas, these drivers are not on the Peapod payroll. The Petitioner does not seek to represent them. It should also be noted that the Employer does not employ any office clerical employees at the New Hyde Park facility.

<sup>7</sup> The exact business relationship between Peapod and Edwards is not clear from the record.

contains two computers, a telephone, a fax machine, a printer, and files. The main office room also contains the computer server and other equipment (e.g., hand-held Palm Pilot computers) stored in a closet there. The main office also has sliding glass windows which open onto the wareroom area. The second office, containing only a computer which is not connected to the main server, is not used on a daily basis. (There is also a separate office for a wareroom manager employed by Edwards, not Peapod.)

The Employer's customers place their grocery orders via the Internet. After the Employer receives the orders in the computer, it downloads certain information into the Palm Pilot computers. The Palm Pilots are then distributed to shoppers, whose job is to fill the orders. Each customer's order is divided into various sub-lists, such as dried goods, chilled goods, etc., which are retrieved in the respective areas of the second-floor wareroom. Some items, such as meats and seafood, are obtained from the Edwards store. Eventually, the orders are packed into bins, and the bins are brought to an assembly area. From there, the drivers load them into their vehicles and deliver them to customers. The Employer makes deliveries in most of Nassau County and parts of Queens, New York.

The Employer's operation has two overlapping shifts. For full-time drivers, the morning shift is from 7:30 AM to 4:30 PM, and the evening shift is from 2:30 PM to 10:30 PM. The shoppers, all of whom are currently part time, start at 7:00 AM and 5:00 PM, respectively, for the morning and evening shifts. The Employer operates seven days per week.

Michael Pappas is the zone manager in charge of the New Hyde Park facility. Two assistant zone managers, Les Mills and Keith Arnold, work under Pappas. (The zone manager and assistant zone managers will hereinafter be referred to collectively as

"the managers.") At any given time, there is generally at least one of the managers present at the facility. In the Employer's hierarchy, the shift supervisors work primarily under the assistant zone managers. As described in more detail below, their duties include helping to oversee the shoppers' work. The dispatcher/lead driver's duties include helping to coordinate and oversee the drivers' work.

### **Shift supervisors**

The Employer employs three "shift supervisors": Michael Berman, Lisa Miranda and Ellen McGroarty. The Petitioner claims that the shift supervisors are supervisors as defined in Section 2(11) of the Act, and must be excluded from the unit. By contrast, the Employer claims that shift supervisors are not statutory supervisors, and that they share a sufficient community of interest with the petitioned-for shoppers and drivers to mandate their inclusion in the unit.<sup>8</sup>

Miranda and McGroarty work part-time on the evening shifts, 6:00 PM to 11:00 PM, under a "job share" arrangement. One works on Mondays, Wednesdays and Saturdays, whereas the other works on Tuesdays, Thursdays and Fridays. At the hearing, the parties stipulated that the two part-time shift supervisors have the same duties as each other. However, Berman is on a full-time schedule, and mostly works the morning shifts (although he also has one overnight shift, from Sunday night into Monday morning). As described herein, Berman generally has greater responsibilities. Thus, where relevant, the discussion below indicates which characteristics apply to all three shift supervisors, and which apply only to Berman.

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<sup>8</sup> It should be noted that most of the evidence herein regarding the shift supervisors' duties came from the Employer's witness (Pappas, who testified first) even though, under these circumstances, it was the Petitioner's burden to prove the shift supervisors' status as statutory supervisors. The Petitioner's

Zone manager Pappas testified that he himself schedules the shoppers. Certain shoppers are specially trained to select produce, so Pappas makes sure to schedule at least one produce shopper for each shift. To some extent, therefore, the schedule determined by Pappas has pre-determined which shoppers will be assigned to shop produce. All the other shoppers are qualified to shop the dry goods and chilled goods, which do not require the same level of specialized training as produce.

Berman's duties include downloading customers' orders from the computer.<sup>9</sup> All three shift supervisors distribute the orders to shoppers, and prepare related paperwork. Obviously, the shift supervisors give the produce portion of each order to the produce shopper scheduled by Pappas, and gives the other portions to other shoppers. The shift supervisors generally oversee the shoppers' filling of orders, such as coordinating different portions of an order, telling the shoppers what to do next, and helping to find missing items. To some extent, the shift supervisors also deal with drivers, for example, reviewing their "quality control" paperwork when they return from deliveries.

Pappas estimated that Berman spends approximately 30% of his time in the managers' office, and 70% on the shopping floor. While Berman is on the shopping floor, he both oversees the shoppers and he shops some orders himself. Shopper Lee LaCorte estimated that Berman spends only 10% of his time actually shopping. The record also indicates that Berman has driven delivery vehicles two or three times when the Employer was short of drivers. Pappas estimated that the part-time shift supervisors spend up to 90% of their time shopping, and 10% of their time in the office. However,

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witness later gave some additional testimony regarding the shift supervisors. The shift supervisors themselves were not called to testify by either party.

LaCorte estimated that the part-time shift supervisors spend only about half their time shopping.

The shift supervisors train new shoppers, as do other shoppers. Berman fills out a "certification" form, rating the shopper from 0 to 5 on various shopping skills (how to select the items, pack the cart, deal with coupons and special promotions, etc.). The assistant managers also fill out the certification form, but not the part-time shift supervisors. The shift supervisors must notify the zone manager if a new employee needs more training.

Shift supervisors do not schedule employees, do not replace absent employees, do not have the authority to change employees' schedules or to grant time off, do not authorize overtime, and do not keep employees' time records. Only the managers perform those functions. Likewise, when the Employer has fewer orders than expected for an upcoming shift, and decides to "call off" some shoppers (i.e., to tell scheduled shoppers not to report to work), the managers decide who should be called off. Berman calls the shoppers to notify them, but does not make the decision.

According to Pappas, shift supervisors do not have authority to suspend or discharge employees, nor have they recommended suspensions or discharges. Pappas stated that Berman has authority to "write up" employees (i.e., to issue written warnings) without consulting the managers, although Berman has not actually done so. As an example, Pappas explained that when an employee named Joseph Gillespie did not show up for work, Berman asked him (Pappas) what to do, and Pappas responded that Berman

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<sup>9</sup> Pappas testified that the part-time shift supervisors also have access to the computer, but they do not use it as much. In part, this is because orders have already been downloaded by the time they arrive for the evening shift.

should write up Gillespie. Similarly, when another employee named Elaine Austin failed to show up, Pappas told Berman to write her up. Thus, Pappas explained that all of Berman's warnings have been issued "through" managers.<sup>10</sup> Warnings are placed in employees' personnel files. Pappas said that, in theory, if an employee has repeated warnings, the warnings may lead to further disciplinary action, but that this has not actually happened. Pappas also stated that, in theory, the part-time shift supervisors have authority to write up employees, but that he has not told them that.

In what may have been hearsay testimony, LaCorte testified that Berman told her he had written up Joseph Gillespie. She continued: "He told me that he [Berman] was the only reason Joe was still there because they [the Employer] wanted to let him go and he felt Joe was a very good shopper." Although Pappas testified about Gillespie's warning, he was not specifically questioned whether Berman played any role in deciding whether Gillespie would be terminated. As noted above, Berman himself was not called to testify.

The shift supervisors do not have authority to hire employees. Hiring for the New Hyde Park facility is done by the managers there, in conjunction with Peapod's regional human resource manager from Boston. Nevertheless, Pappas testified that Berman interviewed about 10 to 12 applicants, and told the managers whether or not each applicant was a good prospect. Pappas stated that he "usually" followed Berman's recommendations. However, the only specific example cited was a former Edwards' employee named Mr. Mooney, whom Pappas recommended hiring, but whom Pappas decided not to hire after checking Mooney's references.

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<sup>10</sup> The written warnings themselves were not submitted into evidence, and the record does not indicate who actually signed the forms.

Shift supervisors may recommend employees for something called the "done-good award." Pappas explained that if an employee gets a certain number of done-good awards, he or she can get "a Blockbuster video or something like that." As a specific example, Pappas recalled that Berman had recommended a done-good award for an employee named David Moses, and that the managers agreed to give Moses the award. Pappas also testified that McGroarty and Miranda have recommended employees for done-good awards, although no specific examples were given.

Pappas testified that the shift supervisors do not have authority to adjust grievances. According to the Employer's written grievance procedure (Employer Exhibit 1), which is distributed to employees as part of the Peapod employee manual, the "chain of communication" starts with the assistant managers. The manual explicitly states that shoppers, drivers and shift supervisors should bring their grievances or suggestions first to assistant managers, then the zone manager, then through the hierarchy up to Peapod's president. According to Pappas, neither Berman nor the part-time shift supervisors resolve employees' grievances. The Petitioner's witness, LaCorte, testified that she and several other employees complained to Berman about one of the assistant managers, and that Berman in turn discussed the problem with Pappas. There was no evidence that Berman exercised authority to *resolve* the grievance, as opposed to merely communicating it on behalf of employees.

Finally, as for other statutory criteria of supervisory status, Pappas testified that shift supervisors do not have authority to promote employees, and have not recommended promotions. They do not have the authority to grant wage increases, and

have not recommended wage increases. They have no authority to layoff or recall employees.

The shift supervisors are paid on an hourly basis. Berman earns \$9.50 per hour, and receives overtime pay for hours worked in excess of 40 per week. Berman receives the same benefits as other full-time employees. The part-time shift supervisors earn \$8.50 per hour, and receive the same benefits as other part-time employees. By comparison, full-time drivers earn \$9 to \$10 per hour, and part-time shoppers earn \$7.50 to \$7.75 per hour.

The New Hyde Park building (containing both the Employer's site and the Edwards Super Store) is always open. Berman has the combination for a lock box which contains keys to the Employer's office. The managers also have this combination, but no one else.

As noted above, there is generally at least one zone manager or assistant manager present at the Employer's facility. However, LaCorte testified that during Berman's overnight shift (Sunday night to Monday morning), he is the only person "in authority" there. During that shift, he authorizes break-times for shoppers. On other days (unspecified in the record), Berman also arrives early in the morning, one or two hours before the managers arrive, and opens the office. If any problems arise while Berman is there without the managers, he can contact Pappas at home. There is always at least one manager present during the part-time shift supervisors' shifts.

Finally, Pappas testified that shift supervisors wear the same clothing (unspecified) that shoppers wear, whereas the managers wear khaki pants, dress shirts, and sometimes neckties.

### **Dispatcher/lead driver**

Joseph Parisi currently holds a combined position of dispatcher/lead driver. The Employer contends that Parisi is a supervisor as defined in Section 2(11) of the Act, and must therefore be excluded from the unit.

Parisi became a part-time driver for Peapod in November 1998, then a full-time driver in early January 1999, then the dispatcher/lead driver later in January 1999. He usually works the morning shift, from 7:30 AM to 4:30 PM.

Both Parisi and Pappas testified regarding Parisi's duties. Parisi goes into the managers' office at the New Hyde Park facility at 7:30 AM. From a countertop there, he distributes delivery routes, vehicle keys and two-way radios to drivers through a sliding glass window. Then he and the drivers go to the assembly area, to load the orders onto their vehicles. Parisi loads his own vehicle, and also oversees the other drivers' loading. The route distribution and loading procedures combined take approximately one hour. Parisi then drives his delivery route, which is usually the shortest route, so that he can return to the facility by 1:30 or 2:00 PM before the other drivers return. Parisi then oversees morning-shift drivers as they return from their routes, including inspecting their delivery paperwork<sup>11</sup> and making sure all equipment is returned. At that time, Parisi also gets the routes ready for the evening-shift drivers who arrive at 2:30 PM, and oversees their loading as well.

As for the distribution of routes, Parisi testified that when he comes into work, the

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<sup>11</sup> Specifically, Parisi inspects a delivery form called "Peapod Copy" (Employer Exhibit 3) to make sure that all the information has been recorded accurately, such as the customer's method of payment. If there is a mistake, Parisi may ask the driver to correct it, and/or make a note of any billing problems for the Employer's files. Each form has signature lines for the customer, driver and Parisi as the "supervisor."

printed routes have already been prepared. He explained: "They are just laying there on the table already set to go.... [A]ll you just got to do is hand them out.... I just pick a route and whoever is standing there gets that route." Parisi generally denied using any judgment to distribute the routes, reiterating on cross-examination that whichever driver is "standing there" gets "whichever route I pick up." If a driver calls in sick, Parisi may have to divide up the driver's route, e.g., giving a couple of stops to each of the other drivers.

Parisi estimated that he spends about 70% of his work time driving. Although he drives a route on most days, there are some days when he spends the whole shift at the New Hyde Park facility. On those days, his additional duties include helping to answer questions that arise and to coordinate between customers and drivers. For example, if a driver radios in that a certain customer is not answering the doorbell, Parisi tries to telephone the customer, and then instructs the driver by radio what to do (e.g., whether to try the delivery again later). Parisi's instructions in this regard are based on such factors as the time of day, and on policies established by Peapod's department of transportation and operations. When a customer complains of mistakes or omissions in an order, Parisi also decides how to distribute the "redelivery" assignments, based on such factors as which drivers are expected to be in the relevant geographical area.

Parisi has been told by Pappas that he has authority to issue written warnings. Both Parisi and Pappas testified that they discussed a driver (Jason Cohen) who repeatedly violated the Employer's loading procedures, despite having been verbally "counseled" by Parisi. Pappas told Parisi that if Cohen continued to have the problem, Parisi could "write him up," although Parisi did not actually do so. Pappas testified that

he himself later wrote up Cohen. There were no other instances of Parisi's involvement in warnings or discipline.

When new drivers are hired, Parisi helps to train them. Typically, a new driver spends 3 or 4 days watching Parisi work, then Parisi spends 1 or 2 days watching the driver work. Parisi fills out a training "certification" form, which is similar to the certification which Berman fills out for the new shoppers. (Other drivers also help to train new drivers, but they do not fill out this form.) Pappas testified that Parisi recommends whether the driver is ready to take routes on his own, or whether he needs additional training. However, it appears that the Employer independently decides whether to extend the training. For example, Pappas testified that although Parisi recommended additional training for a driver named Shawn Yarborough (stating "I don't think this guy is going to make it"), the Employer nevertheless let Yarborough drive on his own.

Parisi testified that he does not hire, fire, promote, transfer, or lay off employees. He does not grant wage increases, or otherwise reward employees. According to Parisi, the Employer never told him he could recommend hiring, firing or rewarding<sup>12</sup> employees. Furthermore, Parisi does not schedule employees, grant time off, keep employees' time records, approve employees' time cards when they arrive late or punch out early. He does not decide which drivers should be "called off" when they are not needed for a scheduled shift, although he sometimes makes the telephone calls to notify them.

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<sup>12</sup> Pappas testified that Parisi has authority to recommend employees for "done-good awards," although he has not actually done so. Parisi himself was not specifically asked about the done-good awards.

Pappas testified that Parisi communicates drivers' complaints (e.g., the bins are packed too heavily) to managers, but there is no evidence that Parisi has authority to adjust or resolve those complaints. As mentioned above in connection with the shift supervisors, the Employer's written procedure instructs employees to bring grievances to the assistant managers and others higher in the "chain of communication."

When Parisi was promoted to the dispatcher/lead driver position, his wage increased from \$10 to \$12 per hour. He punches the same time clock as other hourly-paid employees.

In addition to the above evidence regarding Parisi's current duties as the dispatcher/lead driver, the Employer also wanted to elicit testimony regarding what Parisi's duties are expected to become in the future, when the Employer's operations expand. Briefly stated, the Employer contends that the classifications of dispatcher and lead driver will be separated, as they are at Peapod's operation in Chicago, and that Parisi will work as a salaried dispatcher, with greater supervisory duties. However, the Hearing Officer sustained an objection by the Petitioner, ruling that only Parisi's *current* status is relevant.

### **Discussion**

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Company, Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of

supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the burden of proving their supervisory status. Tuscan Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not merely "routine" in nature.

In the instant case, I find that the Petitioner has not met its burden of establishing that shift supervisors are supervisors as defined in the Act. At most, they possess some low-level authority to assign and oversee employees, but without using independent judgment and thus, without exercising any supervisory authority as envisioned by Section 2(11) of the Act.

The record indicates that the shift supervisors' role in "assigning" or "directing" shoppers is routine in nature. The shift supervisors do not even decide which shoppers should shop the produce items, and which shoppers should shop the other items, since zone manager Pappas has already made that determination when he schedules all the employees for each shift. The shift supervisors' act of merely distributing those sub-lists from the customers' orders to the respective shoppers (i.e., giving the produce sub-lists to the pre-determined produce shoppers, giving other sublists to other shoppers) is an administrative function and does not require the exercise of any significant independent judgment.

The record reveals that shift supervisors may recommend employees for "done-good awards." However, there is no evidence that the managers automatically accept the shift supervisors' recommendations, without making their own review of the employees' accomplishments. In any event, the value of these awards -- apparently the few dollars it costs to rent a video -- is too *de minimus* to confer supervisory status.

Similarly, although Pappas testified that shift supervisors have authority to issue written warnings to employees, there is no evidence that Berman has ever issued warnings on his own, without being told to do so by a manager. Pappas had not even told the part-time shift supervisors that they had such authority. In any event, even assuming *arguendo* that all the shift supervisors have full authority to issue warnings on their own, the evidence fails to establish that the warnings would have any independent impact on employees' status. The warnings essentially constitute reports of misconduct, to be placed in employees' files, with no independent effect. There was no specific evidence, for example, that such warnings automatically result in suspensions or terminations under a progressive disciplinary system. Under these circumstances, the shift supervisors' warnings do not establish any authority to discipline employees under Section 2(11). Panaro and Grimes, a Partnership, d/b/a Azusa Ranch Market, 321 NLRB 811, 813 (1996)(absent evidence of impact on employee's status, "the mere issuance of a written warning is insufficient to establish supervisory authority"); Illinois Veterans Home at Anna, L.P., 323 NLRB 890 (1997).

As mentioned above, LaCorte gave the following testimony about shift supervisor Berman: "He told me that he [Berman] was the only reason Joe [Gillespie] was still there because they [the Employer] wanted to let him go and he felt Joe was a very good

shopper." Conceivably, one could argue that this testimony shows Berman's authority to effectively recommend whether or not employees should be discharged. On the other hand, this alleged comment could be no more than mere puffery on Berman's part. Without detailed, direct evidence on the Employer's decision-making process vis-à-vis Gillespie (such as testimony from Pappas, Berman, or Gillespie himself, and/or documentary evidence), it is impossible to determine whether the Employer simply accepted a recommendation made by Berman, or whether the Employer independently investigated Gillespie's situation before making a decision. This bit of hearsay evidence, by itself, is insufficient to establish that Berman has independent authority to effectively recommend whether employees should be discharged.<sup>13</sup>

Although Pappas testified that Berman had interviewed job applicants, and that he (Pappas) "usually" followed Berman's recommendation, there were no specific examples given of applicants hired based solely or primarily on Berman's recommendation. In fact, the only specific example on the record indicates that Pappas did *not* follow Berman's recommendation to hire an applicant (Mooney) after checking the applicant's references. It is not clear from the record to what extent the Employer would normally conduct an independent review of an applicant's qualifications (including references) before making a decision to hire. Thus, the record falls far short of demonstrating that Berman has authority to effectively recommend hiring employees.

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<sup>13</sup> The Board will admit hearsay evidence only when it is "rationally probative in force" and "corroborated by something more than the slightest amount of other evidence." RJR Communications, Inc., 248 NLRB 920, 921 (1980); West Texas Hotels, Inc., d/b/a Midland Hilton and Towers, 324 NLRB 1141 (1997). LaCorte's testimony in this regard was wholly uncorroborated by Pappas' testimony or anything else in the record. There was no showing that Berman could not have been subpoenaed to testify, or that documentary evidence could not have been subpoenaed. *See also* District No. 1, Marine Engineers' Beneficial Association (Dutra Construction Co.), 312 NLRB 55 (1993)(Respondent failed to meet burden of proving supervisory status by submitting an affidavit from a witness not shown to be unavailable).

Finally, the record indicates that shift supervisors have no authority to suspend, discharge, promote, layoff or recall employees; to grant wage increases or other significant rewards; or to adjust employee grievances. In short, the record contains no substantial evidence that shift supervisors possess any of the supervisory powers enumerated in

Section 2(11) of the Act. Absent proof of the "primary" statutory criteria, evidence of any "secondary" criteria (e.g., Berman's access to the lock box) is insufficient to support a finding of supervisory status. Bay Area-Los Angeles Express, Inc., 275 NLRB 1063, 1080 (1985). It should also be noted that although the shift supervisors are paid at a higher hourly rate (\$8.50 to \$9.50) than the shoppers (\$7.50 to \$7.75), they are not paid more than the full-time drivers (\$9 to 10).

Based on the foregoing, I find that the Petitioner has not met its burden under Tuscan Gas, supra, of proving that the "shift supervisors" are supervisors as defined in Section 2(11) of the Act.

Furthermore, I agree with the Employer's assertion that, under these circumstances, it would be inappropriate to exclude shift supervisors from the bargaining unit. The shift supervisors' duties (including downloading customers' orders, distributing the shoppers' equipment and assignments, and generally coordinating the various shopping portions of each order) are functionally integrated with the shoppers' work, and cause frequent contact between the two groups. Although shift supervisors spend some time working in the office, they also spend time on the shopping floor, working alongside the shoppers and performing bargaining-unit work. They are paid on an hourly basis, receive the same benefits as unit employees, wear the same clothing, and are supervised

by the same managers. I conclude that the shift supervisors share a sufficient community of interest with shoppers and drivers to mandate their inclusion in the bargaining unit.

Dispatcher/lead driver

Bearing these same principles in mind, I also find that the Employer has failed to meet its burden of proving that the dispatcher/lead driver is a supervisor as defined in Section 2(11) of the Act.

The issue of whether dispatchers are statutory supervisors has arisen in many Board cases. Since the job of dispatchers -- by definition -- is to dispatch employees, they obviously have authority to "assign" and "direct" employees. The determining factor under Section 2(11), absent other supervisory criteria, is whether the dispatchers' duties actually require significant, "independent judgment," or merely "routine" exercises of discretion. In many cases such as B.P. Oil, Inc., 256 NLRB 1107 (1981), *enf'd* 109 LRRM 3296 (3rd Cir. 1982), and Express Messenger Systems, Inc., 301 NLRB 651 (1991), the Board has found that dispatchers' decisions were based on "preexisting priorities" and "commonsense considerations," and their duties were therefore "merely routine or clerical in nature," rather than supervisory.

In the instant case, although the dispatcher arguably "assigns" work to drivers by distributing the routes and redeliveries, I find that he does not exercise independent judgment sufficient to satisfy the Act's definition of supervisor. Rather, like the dispatchers in B.P. Oil, *supra*, Parisi's assignment of work requires only the routine exercise of discretion, falling within the Employer's pre-established parameters and time commitments. *See also* Spector Freight Systems, Inc., 216 NLRB 551 (1975); Bay Area-Los Angeles Express, Inc., 275 NLRB 1063, 1073-76 (1985); Connecticut Distributors, Inc. v. NLRB, 681 F.2d 127, 110 LRRM 2788 (2nd Cir. 1982).

Furthermore, the evidence regarding Parisi does not establish any other supervisory indicia. Parisi has no authority to discipline employees, other than issuing warnings. As noted above, the mere authority to issue written warnings, with no independent impact on employees' status, does not prove supervisory status. Azusa Ranch Market, *supra*. Similarly, training new employees and making recommendations as to their training does not show supervisory authority unless it actually affects their employment status, such as effectively recommending whether probationary employees will be discharged or retained. In this case, the only specific example of Parisi's recommendation regarding a trainee, Shawn Yarborough, was *not* followed by the Employer.

A case cited in the Employer's post-hearing brief, Armored Transfer Service, Inc., 287 NLRB 1244 (1988), is distinguishable. The dispatcher in that case ran the entire operation when the company's president was absent or occupied with other business. Among other things, the dispatcher regularly spoke to customers about new business, decided how the company would handle the work, what routes would be used, which employees and vehicles would be assigned to the routes, and who would work on weekends. He also had authority to suspend employees. Thus, the dispatcher in Armored Transfer, who was found to play a "substantial role in the formulation of the company's rules relating to employee relations," *id.* at 1250, clearly had much greater authority than the dispatcher herein has.

Given the absence of primary supervisory criteria, the fact that Parisi earns a higher hourly rate than the drivers is insufficient to prove supervisory status. He also spends most of his time performing the same work that drivers perform. Finally, I agree

with the Hearing Officer that any testimony about what Parisi's duties might be in the future, if the Employer's expansion proceeds as hoped, is speculative and irrelevant at this time. If the dispatcher's duties indeed change in the future, the parties can appropriately deal with it at that time.

Based on the foregoing, I conclude that the Employer has not met its burden under Tuscan Gas & Electric, supra, of establishing that the dispatcher/lead driver is a supervisor within the meaning of Section 2(11) of the Act. The dispatcher/lead driver classification will therefore be included in the bargaining unit, along with the drivers, shoppers, and shift supervisors. This unit essentially constitutes all of the non-supervisory employees employed by Peapod<sup>14</sup> at the New Hyde Park facility.

Accordingly, I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its 697 Hillside Avenue, New Hyde Park, New York facility, including personal shoppers, drivers, shift supervisors, dispatcher/lead drivers, but excluding guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate, at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work

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<sup>14</sup> As noted above in note 4, there appears to be no dispute that drivers from an "on-call service" are not employed by the Employer herein (Peapod Inc.). Because the unit description above is limited to employees *employed by the Employer*, the description need not expressly exclude "subcontracted workers."

during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States who are employed in the units may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by United Food and Commercial Workers, Local 342-50, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, four (4) copies of an election eligibility list, one for each unit, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the lists available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such lists must be received in the Regional Office, One MetroTech Center North-10th Floor (corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201, on or before June 21, 1999. No extension of time to file the lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in

extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by June 28, 1999.

Dated at Brooklyn, New York, this 14th day of June, 1999.

/S/ ALVIN BLYER

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Alvin Blyer  
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National Labor Relations Board  
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